

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ANNA MCCUMBERS and DEBORA PIGMAN,
Grievants,

v.

Docket No. 2019-1226-CONS

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
BUREAU FOR CHILDREN AND FAMILIES,**
Respondent.

DECISION

Anna McCumbers, Grievant, filed two grievance against her employer, Respondent, Department of Health and Human Resources ("DHHR"). Both grievances were dated March 4, 2019. In one grievance Ms. McCumbers alleges: "Grievant is assigned a case load bigger than other CPS workers. Discrimination." As relief, Grievant is seeking a similar case requirement as other Child Protective Service ("CPS") workers. In the other grievance, Ms. McCumbers alleges: "Grievant is not being timely reimbursed for work-incurred expenses. As relief, Grievant seeks, "[T]imely reimbursement plus interest on all late reimbursements."

A level one hearing was held on April 4, 2019, and a decision denying the grievances was entered on April 24, 2019. Grievant appealed to level two the same day. A mediation was conducted on August 8, 2019. Grievant perfected her appeal to level three on August 19, 2019.

A level three hearing was conducted at the Charleston office of the West Virginia Public Employees Grievance Board on January 8, 2020. Grievant personally appeared and was represented by Chester A. Sprankle. Respondent appeared through Melanie

Urquhart, Manager of the CPS Crisis Response Team, and was represented by Mindy M. Parsley, Assistant Attorney General.

Subsequent to the level three hearing, Grievant, Debora Pigman, filed a level three grievance¹ against Respondent DHHR dated January 10, 2020, also alleging that she was not being paid her travel reimbursements in a timely manner. Ms. Pigman also seeks, timely reimbursements plus interest on all late reimbursements. By agreement of Grievant Pigman and Respondent this matter was consolidated with the McCumbers grievance for decision.² An Order of Consolidation was entered on February 26, 2020. This matter became mature for decision on February 21, 2020, upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.³

Synopsis

Grievants are both employed by Respondent in the Bureau for Children and Families. They are CPS Workers assigned to the Crisis Response Team. Grievants make two discrete claims. First, Grievant McCumbers and Grievant Pigman allege that Respondent is not reimbursing them in a timely manner for expenses they incur while performing their mandatory duties. These delays are for long periods and cause Grievants financial distress. Grievants did not prove that the delays were intentional or that Respondent was violating any law, rule, regulation or policy.

¹ The parties agreed to waive the grievance to level three pursuant to W. VA. CODE § 6C-2-4(a)(4).

² Grievant testified in the level three hearing in the McCumbers grievance. She was not represented at that time, but she was represented by Trent Redman, Esquire, when she agreed to this consolidation.

³ Grievant Pigman elected not to file separate Proposed Findings of Fact and Conclusions of Law.

Next, Grievant McCumbers alleges that Respondent has a performance standard and expectation requiring her as a CRT CPS Worker to complete at least 15 CPS cases per month, while regular CPS Workers are only required to complete ten. She argues that the performance standard is arbitrary and capricious as well as discriminatory. Respondent demonstrated that the standard was interpreted and applied by management to be a flexible goal rather than a hard and fast expectation. Also issues which impair Grievant and others from meeting the goal are considered and applied. Grievant did not prove that she, as a CRT CPS Worker, was similarly situated with regular CPS Workers or that the standard as applied is arbitrary and capricious.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Both Grievants are employed by the Department of Health and Human Resources ("DHHR"), in the Bureau for Children and Families ("BCF"). Their positions are within the Child Protective Services ("CPS") Worker classification and they are assigned to the BCF Crisis Response Team ("CRT"). Grievant McCumbers has been assigned to the Crisis Response Team for fourteen years. She works in the north district. Grievant Pigman is assigned to the south district and has been a Crisis Response Team CPS Worker for four years.

2. The BCF created the CRT because the Bureau was experiencing large backlogs of child protective services cases in several counties. Members of the CRT travel to assigned regions around the state and work to reduce the backlogs in those assigned offices. There was originally one CRT for the entire state.

3. The DHHR sought approval from the State Personnel Board (“SPB”) for CPS Workers and a CPS Supervisor assigned to the CRT to receive an additional 10% pay “to travel throughout the State of West Virginia and assist in the DHHR offices where the caseload has reached a critical level.”⁴ That proposal was numbered SPB 2651 and was approved to become effective June 1, 2014. In that proposal, it was noted that the BFS had been utilizing a CRT for approximately ten years but had never been able to keep the team fully staffed. Respondent proposed a pay increase for CRT CPS Workers to 10% above the incumbent CPSW’s base pay as a “Recruitment Incentive.” (Joint Exhibit 4)

4. On July 27, 2017, the State Personnel Board approved proposal SPB 2651-A which increased the size of the CRT to 20 full-time CPS Workers and two CPS supervisors. DHHR BCF was also authorized to temporarily assign additional CPS Workers to the CRT for periods of three to six months per year on an as needed basis. The proposal also modified the training necessary to qualify for the CRT CPS Workers requiring them to have at least two years of successful CPS experience, as well as Regional Manager Training including CRT Protocols and District Backlog Management Plans. The additional pay was increased from 10% to 20%, because “the turnover rate [for the CRT] has remained consistently high and there has been an increased need for CRT intervention.”⁵

⁴ Joint Exhibit 4, Proposal Review Summary for Proposal SPB 2651-A.

⁵ *Id.* The increase in CPS referrals was exacerbated greatly by the opioid epidemic.

5. The team was divided into a northern district and a southern district with a separate CPS Supervisor directing each district unit. CRT CPS Workers are generally assigned to the district in which their home is located.

6. The SPB 2651-A Proposal Review Summary states the following:

The original proposal [SPB 2651] stated the average caseload for a CPSW was twelve (12) investigations per month and the average caseload expectation for a CRT member was twenty (20) investigations per month. While “regular” CPSWs received cases on an ongoing basis (as one case is closed, another opens), CRT members receive all assignments at once. . . [T]his proposal [modifies] the average caseload for a CPSW to ten (10) per month, and [modifies] the expectation of the CRT members to eighteen (18) per month, unless the complexity of the cases dictates otherwise.⁶

7. CRT members are required to spend large blocks of time away from home, travel extensively, and work a significant amount of overtime. As a result, CTR CPS Workers incur a lot of business expenses for meals, mileage, and other things incidental to their jobs. They are required to pay these expenses out of pocket and submit Travel Expense Account Settlement (“TEAS”) forms for reimbursement from Respondent.

8. The *State of West Virginia Travel Rules* contain the following provisions:

§ 2.8 – The Spending Unit shall audit and submit an accurate Travel Expense Report for reimbursement to the State Auditor’s Office within fifteen (15) days after completion of travel.

§ 3.3 – Travel reimbursement requests must be submitted in wvOasis⁷ and have all required receipts and forms attached before submitting to the Spending Unit.

Id.

⁶ *Id.*

⁷ DHHR does not require or allow the traveler to submit their initial form on wvOasis.

9. In August 2018, James Weekley, BCF Chief Financial Officer (“CFO”), required all BCF employees submit their TEAS forms to the Central Finance Office in Charleston, where they are audited, approved and keyed into the electronic reporting system (wvOasis), at the BCF office. This change was made by CFO Weekley because some travel expenses were being charged to incorrect funding sources.⁸ There are two full-time employees assigned to audit these expenses and enter them into wvOasis before forwarding the claims to the State Auditor’s office for payment. The goal is for each claim to be processed by these employees within a week of receiving it.

10. Over the period of December 2018 and January 2019, the State Auditor’s office instituted tighter constraints on travel reimbursements, ostensibly to prevent possible fraud or mistaken reimbursements. Employees for State agencies, including Respondent, have gone through a training and adjustment period while working through the new requirements.

11. If any errors are found in the expense requests, by either the BCF, Central Finance or the Auditor’s office, the form is returned to the employee for correction and the process starts again.

12. Grievant McCumbers produced several expense forms which took from two to four months to be processed for payment. (Grievant Exhibits 1 through 12). She also presented a form indicating that there were mistakes on an expense claim that Grievant was required to correct and resubmit. The original expense claim was submitted near the end of September 2018. The form requesting correction was dated March 7, 2019. These

⁸ DHHR receives funding from a variety of sources including but not limited to State appropriations, Federal programs and grants.

expenses had to be resubmitted through the approval and payment process more than five months after they had been submitted.

13. Grievant Pigman suffered similar delays in receiving reimbursements for her business expenses. Some of the expense claims filed by Grievants amounted to hundreds of dollars of their own money which they had to go without while the claims were pending, resulting in financial hardship for both.⁹

14. Respondent did not dispute that there are significant delays in reimbursement of the travel expenses of members of the CRT teams, as well as other DHHR employees. Respondent claims to be investigating the cause of these delays, however, all witnesses testified that the problem is getting worse.

15. CRT CPS Workers, including Grievants, have the specific, primary objective of clearing back logs of CPS referrals that are more than thirty days old in the counties or districts to which they are assigned. When assigned to clear the backlog, they are typically not required to be on call, or in rotation. They are not required to see “walk-ins” take telephone calls, nor file petitions in circuit regarding child abuse and neglect proceedings.

16. CRT members are experienced and successful CPS Workers who can process cases more efficiently than new workers. Because of this focus and the reduction of many tasks required of regular CPS Workers,¹⁰ they are charged with clearing at least eighteen cases per month, as opposed to the ten cases per month expectation for CPS

⁹ At the time of the hearing, Grievant Pigman had unpaid expense requests exceeding \$4,000.

¹⁰ The parties often referred to Regular CPS Workers as “Intake Workers” even though CPS Workers perform a wide variety of duties including but not limited to intake.

Workers in the daily rotation. These expectations were set out by the State Personnel Board in SPB 2651-A at the request of Respondent.

17. Supervisors are required to complete employee performance appraisals for all of their subordinates. The appraisals are recorded on employee performance appraisal forms (EPA forms) and are completed utilizing a three-step process.¹¹

18. The EPA-1 is completed within thirty days of the employee starting employment, or near the beginning of each annual rating period. The EPA-1 is used “to identify, define, and describe performance expectations.”¹²

19. The EPA-2 is complete near the midpoint of the employee’s rating period and is utilized “to provide feedback to the employee concerning the employee’s strengths, weaknesses (if any), and performance” during the first half of performance period. The EPA-2 is intended to give the employee notice of any performance expectations which are not being achieved, as well as to provide time and guidance for the employee to correct any performance issues prior to the final appraisal.¹³

20. The EPA-3 is completed within thirty days of the end of the annual rating period and is utilized “to provide employees with a formal rating of their overall job performance throughout the entire rating period and to generate information to be used as the basis for future performance planning.”¹⁴ The employee is rated on a set of performance standards related to the duties set out in the EPA-1 and given a numeric score which is used to determine if the employees performance is rated as “Needs

¹¹ See Division of Personnel *Supervisor’s Guide to the Performance and Appraisal Process*. (“EPA Guide”)

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

Improvement,” “Meets Expectations” or “Exceeds Expectation.” A rating of “Needs Improvement” is considered less than satisfactory and can lead to the implementation of a plan of improvement and/or disciplinary action.

21. Under the “Performance Standards and Expectations” section of Grievant McCumber’s EPA-1 is listed “Complete a minimum of 15 or more CPS referrals per month.” That standard is included on the EPA-1s of all members of the CRT. This standard differs from the requirement of 18 cases per month approved in SPB 2651-A.

22. Few CPS Workers on the CRT regularly meet that standard and many fall short on a regular basis. It is not possible to continuously meet the standard of fifteen referrals per month.¹⁵

23. CRT management tracked the clearance rate for the north team for a period of 12 months from February 2018 through January 2019. The number of cases cleared by each member is set out in the following table:¹⁶

	Feb.	March	April	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	Jan.
1	9	11	13	13	20	17	14	7	18	11	8	1
2	10	10	6	10	7	13	11	11	14	11	1	*
3	*	*	6	16	12	18	17	12	13	7	5	*
4	11	6	14	11	2	9	12	11	12	8	5	1
5	18	1	5	3	22	29	9	21	20	22	12	*
6	2	14	9	30	3	1	3	1	*	*	*	*
AM	4	6	5	14	14	31	16	11	18	18	7	*

24. Grievant McCumbers cleared 15 or more cases per month four times during the period February 2018 through January 2019. One CRT north team member met the

¹⁵ Testimony of a CPS Supervisor for the CRT.

¹⁶ This table was created from data set out in Joint Exhibit 8. Seven team members were listed including Grievant McCumbers. In the table Grievant’s initials “AM” are used and the remaining team members are assigned a number one through six. The “*” indicates that no data was listed for the team member in that month.

goal for six months, one met the standard for three months, one met the standard for two months, one met the standard for one month, and two did not clear at least 15 cases for any month during the twelve month-period. See FOF 23 *supra*.

25. The seven-member north team as a group cleared 857 referrals during that twelve-month period at an average of 10.2 case closures per month per team member. During the same period the north team opened 22 new referrals, completed 68 plans of care, and 4 safety plans. (See Joint Exhibit 8)

26. Melanie Urquhart, Manager of the CPS Crisis Response Team, view this standard more as a goal than an expectation, and flexibility is built into achieving the goals based upon the actual duties of the CRT CPS Worker for each month and the complexity of the cases. However, the wording of the standard of performance in the EPA-1 does not contain such flexibility, and Manager Urquhart agrees that failure to meet the standard on a regular basis could lead to a lower evaluation rating and/or disciplinary action.

27. Grievant McCumbers' EPA-3 for the rating period of September 1, 2016 through August 30, 2017, was admitted into the record as Joint Exhibit 5. This rating is generally representative of her performance evaluation scores. Grievant McCumbers was not able to routinely meet the standard of clearing 15 cases per month during this rating period. Grievant McCumbers received an overall numerical score of 2.6 which resulted in an Alpha Score of "Exceeds Expectations." For the criterion "work output matches expectation established" Grievant was rated "Exceeds Expectations."

28. In addition to her duties related to clearing the backlog, Grievant McCumbers has been placed in the daily referral rotation in her assigned counties requiring her to take new intakes through walk-ins and telephone calls, file petitions in

circuit court as well as testify in proceedings related to those petitions. While working in rotation Grievant's written performance expectation of clearing fifteen cases per month remains the same even though she is performing all the tasks of regularly assigned CPS Workers with an expectation of clearing ten cases per month.

Discussion

These consolidated grievances do not challenge a disciplinary action, so Grievants bear the burden of proof. Grievants' allegations must be proven by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

Grievants have filed claims related to two distinctly different issues and sets of facts. First, both Grievants argue that they are not being reimbursed in a timely manner for expenses they incur in the daily performance of their duties as CRT CPS Workers. They point to the requirement in the State Travel Policy that expense requests be forwarded to the Auditor's office for payment within fifteen days of their submission to Respondent and argue that Respondent is out of compliance with the travel rule.

Second, Grievant McCumbers alleges that on a daily basis she performs the same duties as other CPS Workers. She avers it is discrimination to give her a performance

expectation of closing fifteen cases per month while CPS Workers who are not on the CRT are only required to close ten cases per month.¹⁷

It is not disputed that Grievants are required to travel extensively in the performance of their CRT CPS Worker duties. They are often assigned away from their home counties and must stay in commercial lodging throughout the week. They incur expenses related to the use of their personal vehicles, meals, and other incidentals. Grievants are required to initially pay for these expenses out-of-pocket and seek reimbursement from Respondent by submitting TEAS forms to the BCF which must eventually be submitted to the West Virginia Auditor's office for approval for payment.

Grievants proved that they often wait weeks or months to receive their reimbursement for expenses and that these expenses are often significant sums of money. Respondent concedes these facts. The problem arises regarding where the delay is taking place.

BCF CFO Weekley testified that Central Finance generally processes and forwards expense claims within a week of receiving them. However, he emphasized that claims are being more closely scrutinized than in the past with the result that many are being returned to employees for resubmission. These returns emanate from Central Finance as well as the Auditor's Office. These corrected submissions add to the large quantity of claims which must be processed by the two employees in Central Finance.

¹⁷ Grievant Pigman did not file a separate grievance related to this issue. Accordingly, she is only a claimant in this matter regarding the expense reimbursement issue. However, she testified that she and some other members of the CRT also felt that this performance was not achievable and discriminatory.

There was no definitive proof that any one issue is the source of the long delays in reimbursement.

The only specific required deadline for the processing of expense reimburse claims is found within the *State of West Virginia Travel Rules* which require at section 2.8 that:

“The Spending Unit shall audit and submit an accurate Travel Expense Report for reimbursement to the State Auditor’s Office within fifteen (15) days after completion of travel.

While there was a plethora of proof that Grievant’s expense requests are not being expeditiously paid, it was not proven that all, or even the majority these delays were caused by the initial requests not being audited and submitted to the Auditor’s office for payment within fifteen days. Given the length and quantity of the delays one might infer that at least some of the claims were not being timely submitted to the Auditor for payment, but speculation does not amount to proof.¹⁸ Additionally, some of the delay may be occurring at the Auditor’s office over which the Grievance Board has no jurisdiction.

Most importantly, Grievants did not point to any law, rule, or regulation which requires these expenses to be paid within a certain time period. Without a specific deadline for payment and/or some specific proof as to where the delays are happening, it is not possible to find that the delays are a result of arbitrary and capricious action by Respondent.¹⁹ One would hope that if Respondent can identify the cause of at least some

¹⁸ “The Grievance Board has routinely held that speculation is not sufficient to meet the proof burden. See, *Coleman v. Dep’t of Health & Human Res.*, Docket No. 03-HHR-318 (Jan. 27, 2004).” *Wheeler v. Dep’t of Environmental Protection & Div. of Per.*, Docket No. 2018-1122-DEP (Feb. 27, 2019).

¹⁹ An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982).

of these delays, it would take expeditious action to remedy them. Unfortunately, there is not sufficient proof in this record to point to the specific cause or causes.

The next issue relates to the performance expectation stating Grievant McCumbers and other CRT CPS Workers must, "Complete a minimum of 15 or more CPS referrals per month."²⁰ Grievant argues that expectation is unreasonable and impossible to regularly achieve. She also argues that requiring CRT CPS Workers to clear fifteen cases monthly when regular CPS Workers are only required to clear ten constitutes discrimination.

For purposes of the grievance procedure, "discrimination" is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2 (d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

- (a) That he or she has been treated differently from one or more similarly-situated employee(s);
- (b) That the different treatment is not related to the actual job responsibilities of the employees; and,
- (c) That the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007);

Harris v. Dep't of Transp., Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievant notes that there is no separate job classification for CTR CPS Workers. Their position is in the same classification as other CPS Workers. She alleges that CRT

²⁰ Specified in Grievant McCumbers' EPA-1. (Joint Exhibit 5)

employees are required to perform the same duties as other case workers such as opening cases, preparing safety plans and plans for care, as well as file petitions in circuit court. These duties are on top of having to clear referrals from the case backlog. Grievant avers those facts render them to be similarly situated to Intake CPS Workers. There is no dispute that CRT CPS Workers are treated differently from Intake CPS Workers in that they have a performance expectation that they clear five more referrals per month than the Intake CPS Workers. Grievant did not agree to this difference in writing.

Respondent counters that, notwithstanding being in the same job classification, CRT CPS Workers, including Grievant, are not similarly situated with Intake CPS Workers. The State Personnel Board approved creating a specific group of CPS Workers for the CRT which had different responsibilities and compensation from Intake CPS Workers. CRT CPS Workers have the primary responsibility to reduce the referral backlogs which occur in various offices around the state and are required to travel to those counties for extended periods of time to accomplish that goal. Because they are assigned to reduce the backlog, they are typically not required to be on call, or in rotation. They are not required to see “walk-ins,” take telephone call, nor file petitions in circuit court regarding child abuse and neglect proceedings. Additionally, they are paid 20% more than their intake colleagues. Ms. Urquhart testified that the additional pay was to compensate CRT members for the higher case closure expectations. However, the reason set forth in SPB 2651-A was to facilitate recruitment and retention for the CRT positions. The inability to attract and retain workers could have been caused by a number of factors including having to spend weeks or months away from home. But there is no mention of the specific issues causing staff shortage for the CRT.

During the period of February 2018 and January 2019, Grievant cleared 144 referrals from backlogs averaging 12 per month. She only received 5 new referrals, created 2 safety plans, and 2 plans of care. Since that time, Grievant has been placed in the regular intake rotation and is opening new cases, completing safety and care plans, and filing petitions like the CPS Intake Workers, in addition to her primary function of clearing the referral backlog. Grievant was in the regular intake rotation in December 2018 and January 2019. She was only able to clear seven cases from the backlog during that time. (Joint Exhibit 8) Grievant testified that she has filed petitions and created safety plans during 2019, but no specific data was presented at the hearing to prove that her duties are now more closely aligned with those of the Intake CPS Workers.

Based upon the evidence in the record, Grievant did not prove that she and other CRT CPS Workers are similarly situated with Intake CPS Workers, nor did she prove that the difference in their case closure expectation was not related to actual job responsibilities. Consequently, Grievant did not prove by a preponderance of the evidence that she has been subjected to discrimination as that term is defined in W. VA. CODE § 6C-2-2 (d).²¹

Grievant next argues that the "Performance and Expectation" that she "Complete 15 or more CPS referrals a month"²² is unreasonable, arbitrary and capricious. The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones

²¹ Respondent should take note that as Grievant and other CRT members spend more time in the intake rotation, their duties will likely become more aligned with Intake CPS Workers. This could result in the two groups being similarly situated. At the present time this is only speculation which is not proof. See FN 16 *supra*.

²² The minimum standard of 18 referrals per month set out in SPB 2651-A is not listed as an expectation in Grievant's EPA so it will not be addressed further.

which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (citing *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)).

Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001); *Butler v. Dep't of Health & Human Res.*, Docket No. 2014-0539-DHHR (Mar. 16, 2015).

The 15 case closures per month standard as a requirement is problematic. Respondent presented no data or accepted government standard as a basis for it. In fact, the north team supervisor testified that it is impossible to meet the standard on a routine basis. Manager Urquhart testified that a few of the CRT members meet the standard but not the majority. The only empirical data presented indicated that over a twelve-month

period only one member of the north team met the standard half the time, Grievant met it one third of the time, and the remaining five rarely met it if at all. This is particularly telling given that the CPS Workers selected for the CRT must be experienced and successful at their duties. See Joint Exhibit 4. As an absolute standard the expectation that Grievant complete a minimum of 15 CPS referrals per month is arbitrary and capricious.

However, Manager Urquhart testified that she and the supervisors for the Grievant and the CPS Crisis Response Team, view this standard more as a goal than an expectation, and flexibility is built into achieving the goals based upon the actual duties of the CRT CPS Worker for each month and the complexity of the cases. Notwithstanding the wording of the standard in Grievant's EPA-1 does not indicate flexibility, her actual EPA ratings indicate that the raters are interpreting the standard as Ms. Urquhart described. While Grievant does not routinely close 15 cases per month, she received an overall numerical score of 2.6 which resulted in an Alpha Score of "Exceeds Expectations." For the criterion "work output matches expectation established" Grievant was rated "Exceeds Expectations." The evidence produced at the hearing demonstrated that the problematic standard is viewed and scored as a flexible goal with consideration given for the workers actual duties, complexity of cases, and both sick and annual leave. As long as the standard is actually interpreted and applied in that fashion it is not arbitrary and capricious.

Grievants McCumbers and Pigman did not prove by a preponderance of the evidence that Respondent was violating any specific law, rule of regulation as a result of the delay in paying their expenses. Additionally, Grievant McCumbers did not prove by a preponderance of the evidence that the standard of completing 15 CPS referrals per

month, as it is interpreted and applied is arbitrary and capricious. Grievant McCumbers did not prove by a preponderance of the evidence that she was being subjected to discrimination.²³ Accordingly, the grievances are **DENIED**.

Conclusions of Law

1. The consolidated grievances do not challenge a disciplinary action, so Grievants bear the burden of proof. Grievants' allegations must be proven by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

2. The *State of West Virginia Travel Rules* at section 2.8 require:

"The Spending Unit shall audit and submit an accurate Travel Expense Report for reimbursement to the State Auditor's Office within fifteen (15) days after completion of travel.

3. Grievants did not prove by a preponderance of the evidence that Respondent was violating any specific law rule of regulation as a result of the delay in paying their expenses.

4. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2 (d).

²³ Given the subjectivity of this application of the standard it appears to be effective as a goal but its viability as a source for disciplinary decisions is unclear.

5. In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

(a) That he or she has been treated differently from one or more similarly-situated employee(s);

(b) That the different treatment is not related to the actual job responsibilities of the employees; and,

(c) That the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007);

Harris v. Dep't of Transp., Docket No. 2008-1594-DOT (Dec. 15, 2008).

6. Grievant did not prove by a preponderance of the evidence that she has been subjected to discrimination as that term is defined in W. VA. CODE § 6C-2-2 (d).

7. Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Blake v. Kanawha County Bd. of Educ.*,

Docket No. 01-20-470 (Oct. 29, 2001); *Butler v. Dep't of Health & Human Res.*, Docket No. 2014-0539-DHHR (Mar. 16, 2015).

8. Grievant did not prove by a preponderance of the evidence that the standard of completing 15 CPS referrals as it is interpreted and applied is arbitrary and capricious.

Accordingly, the grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. See *also* 156 C.S.R. 1 § 6.20 (2018).

DATE: April 2, 2020

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE